FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 19, 1998

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Carol Pensky, Treasurer
Democratic National Committee
c/o Joseph Sandler, Esq.
General Counsel
430 South Capitol Street, S.E.
Washington, D.C. 20003

RE: MURs 4544; 4407
Democratic National Committee and
Carol Pensky, as treasurer

Dear Ms. Pensky:

On July 9, 1996, and November 1, 1996, the Federal Election Commission notified the Democratic National Committee ("Committee") and you, as treasurer, of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). Copies of the complaints were forwarded to you on these respective dates.

Upon further review of the allegations contained in the complaints, and information supplied by you, the Commission on February 10, 1998, found that there is reason to believe the Committee and you, as treasurer, violated 2 U.S.C. §§ 434(b)(4); 441a(a)(2)(A); 441a(f); 441b(a), provisions of the Act, and 11 C.F.R. § 102.5(a). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath. All responses to the enclosed Subpoena to Produce Documents must be submitted within 30 days of your receipt of this subpoena. Any additional materials or statements you wish to submit should accompany the response to the subpoena. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

You may consult with an attorney and have an attorney assist you in the preparation of your responses to this subpoena. If you intend to be represented by counsel, please advise the

Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. *See* 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, requests for pre-probable cause conciliation will not be entertained after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Joel J. Roessner, the attorney assigned to this matter, at (202) 219-3690. As of March 2, 1998, this phone number will change to (202) 694-1650.

Sincerely,

Joan D. Aikens

Joan D. Aikens
Chairman

Enclosures
Subpoena and Order
Factual and Legal Analysis
Procedures
Designation of Counsel Form

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 4407 and 4544
	)	

SUBPOENA TO PRODUCE DOCUMENTS

To: Joseph Sandler
Democratic National Committee
and Carol Pensky, as Treasurer
430 South Capitol Street, S.E.
Washington, D.C. 20003

Pursuant to 2 U.S.C. §§ 437d(a)(1) and (3), and in furtherance of its investigation in the *above-captioned matter*, the Federal Election Commission hereby orders the Democratic National Committee and Carol Pensky, as treasurer, to produce the documents requested on the attachment to this Subpoena. Legible copies which, where applicable, show both sides of the documents may be substituted for originals.

The requested documents must be forwarded to the Office of the General Counsel, Federal Election Commission, 999 E Street, N.W., Washington, D.C. 20463 within 30 days of receipt of this Subpoena.

WHEREFORE, the Chairman of the Federal Election Commission has hereunto set her hand in Washington, D.C. on this 15th day of Feb., 1998.

Joan D. Aikens
Chairman
Federal Election Commission

ATTEST:

for Mary W. Dove
Marjorie W. Emmons
Secretary to the Commission

Attachments
Document Requests

INSTRUCTIONS

Furnish all documents and other information specified below, however obtained, including hearsay, that are in your possession, custody or control, or otherwise available to you, including documents and information appearing in your records.

Should you claim a privilege or other objection with respect to any documents, communications, or other items about which information is requested by the following requests for production of documents, describe such items in sufficient detail to provide justification for the claim or other objection. Each claim of privilege must specify in detail all grounds on which it rests. No part of a discovery request shall be left unanswered merely because an objection is interposed to another part of the request.

Unless otherwise indicated, the following discovery requests refer to the time period from January 1, 1995 to the present.

The following requests for production of documents are continuing in nature and you are required to file supplementary responses or amendments during the course of this matter if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which such further or different information came to your attention.

DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"Clinton/Gore" shall mean the Clinton/Gore '96 Primary Committee, Inc.

"Commission" shall mean the Federal Election Commission

"DNC" shall mean the Democratic National Committee and each of its accounts

"SKO" shall mean Squier Knapp Ochs Communications

"November 5" shall mean the November 5 Group, Inc.

"State Democratic Party" shall mean the Democratic Party entity for each state in the United States of America, the Democratic Party entity for each territory of the United States of America, and any other Democratic Party entity within the United States of America that is permitted to accept funds from any of the following DNC accounts, or any other DNC accounts: DNC Service Corp./Democratic National Committee, DNC Non-Federal Unincorporated Account, DNC Non-Federal Finance Fund, DNC Non-Federal Building Fund, DNC Non-Federal

Corporate, DNC Non-Federal General, DNC Non-Federal Max-Pac, DNC Non-Federal General #2, and DNC Non-Federal Individual.

"Radio Station" means the place, building, or establishment from which radio services are provided or operations are directed.

"Television Station" means the place, building, or establishment from which television services are provided or operations are directed.

"You," "your" and "their" shall mean the named person or entity to whom these requests are directed, including all officers, employees, agents, volunteers and attorneys thereof.

"Person" shall mean an individual, partnership, committee, association, corporation, labor organization, or any other type of organization, entity or group of persons as defined in 2 U.S.C. § 431(11).

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term "document" includes data or information compiled or maintained in electronic or digital form, such as computer files, tables, spreadsheets or databases. The term "document" also includes, but is not limited to books, letters, contract notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, check ledgers, money orders or other commercial paper, invoices, receipts, wire transfers, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, electronic records, and electronic mail messages. Each draft or non-identical paper or electronic copy is a separate document within the meaning of this term.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, and the number of pages comprising the document. "Identify" with respect to a document shall also mean the identification of each person who wrote, dictated or otherwise participated in the preparation of the document (typists need not be included), each person who signed or initialed the document, each person who received the document or reviewed it, and each person having custody of the document or a copy of the document. Identification of a document includes identifying all originals or copies of that document known or believed to exist.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and telephone numbers, the present occupation or position of such person. If the person to be identified is not a natural person, provide the legal and trade names,

the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these discovery requests all responses that otherwise might be construed to be out of their scope.

Except where the discovery request states otherwise, any reference to the singular shall be construed as including the plural, any reference to the plural shall be construed as including the singular, and any reference to one gender shall include the other.

The Commission incorporates herein by reference the full text of the definitions of other terms set forth in 2 U.S.C. § 431 and 11 C.F.R. § 100.

DOCUMENT REQUEST

1. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by SKO which were paid for in whole or in part by the DNC. Such advertisements include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

2. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by November 5 which were paid for in whole or in part by the DNC. Such advertisements include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

3. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by SKO which were paid for in whole or in part by any State Democratic Party. Such advertisements

include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

4. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by November 5 which were paid for in whole or in part by any State Democratic Party. Such advertisements include, but are not limited to, the television advertisements entitled: "Protect," "Moral," "Emma," "Sand," "Wither," "Families," "Threaten," "Firm," "People," "Children," "Slash," "Table," "Supports," "Defend," "Values," "Enough," "Economy," "Photo," "Same," "Finish," and "Dreams." Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any advertisements. Responsive documents also include any other information which satisfies the definition of "document."

5. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by SKO which were paid for in whole or in part by Clinton/Gore. Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any television, radio or print advertisements. Responsive documents also include any other information which satisfies the definition of "document."

6. All documents in your custody or control that refer to, relate to, or contain any information regarding television, radio or print advertisements developed and created by November 5 which were paid for in whole or in part by Clinton/Gore. Responsive documents include, but are not limited to, all memoranda, scripts, correspondence, notes, financial documents, contracts, agreements, telephone bills, logs, video or audio tapes, and records that reference the planning, organization, development and/or creation of any television, radio or print advertisements. Responsive documents also include any other information which satisfies the definition of "document."

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MURs 4407, 4544

RESPONDENT: Democratic National Committee, and
Carol Pensky, as treasurer

I. GENERATION OF MATTERS

MUR 4407 was generated by a complaint filed by Dole for President, Inc. ("Dole Committee"). MUR 4544 was generated by a complaint filed by Rebecca Roczen Carley, M.D. The Dole Committee alleges that the Democratic National Committee ("DNC") violated 2 U.S.C. § 441a(d) by making coordinated party expenditures on behalf of the Clinton/Gore '96 Primary Committee, Inc., (the "Primary Committee") that exceeded the coordinated party expenditure limit for the 1996 election cycle, and that it violated 2 U.S.C. § 434 by failing to report these coordinated party expenditures. Dr. Carley alleges that the DNC is guilty of "clear cut criminal violations of campaign contribution laws" based on statements made by Ann McBride, president of Common Cause, that were aired on C-Span's Washington Journal. As part of her complaint, Dr. Carley sent the Commission a videotape copy of Ms. McBride's appearance on C-Span.

II. FACTUAL AND LEGAL ANALYSIS

A. COMPLAINTS

1. MUR 4407

On July 2, 1996, the Dole Committee filed a complaint against the DNC. The Dole Committee alleges that the Primary Committee attempted to circumvent the expenditure limit set forth at 2 U.S.C. § 441a(b) by "directing the DNC to make expenditures above and beyond

[the expenditure] limit on behalf of the Campaign." The complaint specifically refers to excerpts from *The Choice*, and states that "President Clinton personally directed and controlled from the White House several ad campaigns that were paid for by the DNC." The Dole Committee contends that President Clinton "was apparently so intimately involved with the DNC advertising that he personally decided what photos should be used in the ads." The complaint further asserts that campaign consultant Dick Morris and Robert Squier, head of the media firm Squier Knapp Ochs Communications ("SKO"), took direction from President Clinton, directed the day-to-day management of the advertisement campaign, and took these actions "in an apparent concerted effort to circumvent the spending limits."

If the advertisements are not considered Primary Committee expenditures, then, the complaint alleges, the advertisements constitute coordinated expenditures pursuant to 2 U.S.C. § 441a(d). The complaint asserts that because the cost of these advertisements totaled $25,000,000, the DNC exceeded the coordinated expenditure limit set forth at 2 U.S.C. § 441a(d)(2). The complaint claims that the DNC made coordinated party expenditures in connection with the general election campaign because its expenditures, although made during the primary campaign, were coordinated with a candidate who was assured of his party's nomination (citing Advisory Opinion ("AO")1984-15).

The complaint further alleges that corporate funds were used to pay for the advertisements in violation of 2 U.S.C. § 441b. The complaint refers to excerpts from *The Choice* and claims that these excerpts suggest that "the opportunity to use corporate money was a prime factor in the decision to run the ad campaigns through the DNC."

2. MUR 4544

On October 21, 1996, Dr. Carley filed a complaint against the national Democratic party. Dr. Carley alleges that the national Democratic party is guilty of "clear cut criminal violations of campaign contribution laws" based on statements made by Ann McBride, president of Common Cause, that were aired on C-Span's Washington Journal. The videotape consists of comments made by Ms. McBride during a press conference publicizing a complaint that Common Cause filed on October 9, 1996 with the United States Department of Justice.

In general, Common Cause alleges that the DNC spent millions of dollars in excess of the overall presidential primary spending limit by paying for television advertisements that benefited President Clinton. Specifically, it claims that "from the summer of 1995 through the summer of 1996, the [Primary] Committee ran an ad campaign through the [DNC] to promote President Clinton's reelection." Common Cause refers to *The Choice*, by Bob Woodward, as well as various press articles that discuss the television advertising campaign paid for by the DNC. Moreover, it suggests that based on FEC disclosure reports, the DNC spent $27 million on the advertisement campaign in 12 targeted states between July 1, 1995 and June 30, 1996. Finally, Common Cause alleges that the television advertisements were "the same kind of ads that any candidate would run to promote his candidacy or criticize his opponent."

B. DNC RESPONSES

On August 16, 1996, the DNC submitted its response to MUR 4407.[1] The DNC contends that the Commission should either dismiss the complaint or, in the alternative,

[1] On July 19, 1996, the DNC requested a 20-day extension of time to respond to the complaint. On July 23, 1996, the Office of General Counsel granted this request. Thus, the response was due by the close of business on August 16, 1996. On September 26, 1996, the DNC submitted a supplement to its response, which included a declaration by Robert D. Squier.

find no reason to believe that it violated the Federal Election Campaign Act of 1971, as amended. 2 U.S.C. §§ 431 et seq. ("the Act").

The DNC argues that the complaint does not comply with 11 C.F.R. § 111.4(d)(3) because it does not contain "a recitation of *any* facts which describe a violation by the DNC of 2 U.S.C. § 441a(d)(2) or of any other statutory provision or regulation." The DNC maintains that the complaint fails to identify or describe the advertisements in question and fails to indicate the broadcast dates of the advertisements or their contents. The DNC asserts that the complaint contains no facts suggesting or indicating that the advertisements conveyed an electioneering message as required by AO 1985-14, and therefore, it made no coordinated party expenditures pursuant to 2 U.S.C. § 441a(d).[2]

The DNC further claims that even if the allegations of coordination were "legally relevant," the complaint contains no evidence to support them. The DNC argues that *The Choice* is not "a factual or accurate report of the events and conversations it recounts" and "[i]t is not the kind of material that should be treated as substantial, cognizable evidence of anything." The DNC asserts that even though the Commission permits complaints to be based on newspaper articles, such articles need to be "well-documented and substantial." The DNC claims that the excerpts from *The Choice* in the complaint are neither well-documented nor substantial.[3]

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[2] The DNC further argues that under the "electioneering" test, the Commission presumes that a party coordinates its communications with its candidates. The DNC, relying on *Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996), asserts that coordinated party expenditures are subject to limitation under 2 U.S.C. § 441a(d) only when the communication depicts a clearly identified candidate and contains an electioneering message.

[3] As an example of the inaccuracy of *The Choice*, the DNC cites a letter from the General Counsel to *The Washington Post* disputing statements that were attributed to him. In addition, on September 26, 1996, the DNC

The DNC makes the alternative argument that even if the Commission accepts the complaint pursuant to 11 C.F.R. § 111.4(d)(3), no violation of the Act has occurred because the advertisements it ran during the 1995-1996 election cycle were not subject to 2 U.S.C. § 441a(d) under either the "electioneering message" standard (set forth in AOs 1985-14 and 19925-25), or the "express advocacy" standard (which the DNC contends is the appropriate standard).

With respect to the electioneering message standard, the DNC claims that the advertisements it ran during the 1995-1996 election cycle were legislative in nature and were the same type of advertisement as was described in AOs 1985-14 and 1995-25. The DNC contends that, pursuant to 2 U.S.C. § 437f(c), it was "clearly entitled" to rely on these advisory opinions in determining that its advertisements did not contain an electioneering message.

The DNC argues that its advertisements likewise do not satisfy the definition of "expressly advocating" set forth at 11 C.F.R. § 100.22(b), nor do they "expressly advocate the election or defeat of any candidate" as that term has been defined by several courts.[4] The DNC further urges that the "express advocacy" standard, not the "electioneering message" standard, is proper test for determining whether expenditures for advertisements are subject to 2 U.S.C. § 441a(d). Specifically, the DNC asserts that the Commission should construe the

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submitted a sworn statement from Robert D. Squier, President of SKO, entitled "Presentation of Robert D. Squier." Mr. Squier disputes several statements in *The Choice* that were attributed to him.

[4] The DNC cites *Federal Election Commission v. Christian Action Network*, No. 95-2600, 1996 U.S. App. LEXIS 19047 (4th Cir., August 2, 1996) (*per curiam*); *Maine Right to Life Committee, Inc. v. Federal Election Commission*, 914 F. Supp. 8 (D. Me. 1996); and *Federal Election Commission v. Survival Education Fund*, No. 89 Civ. 0347, 1994 U.S. Dist. LEXIS 210 (S.D.N.Y., Jan. 12, 1994), *aff'd in part, rev'd in part on other grounds*, 65 F.2d 285 (2d Cir. 1995).

limits of 2 U.S.C. § 441a(d) to apply only when a communication expressly advocates the election or defeat of a clearly identified candidate because a broader construction would impair its ability to communicate party positions on various issues and would have a direct impact on its First Amendment associational rights. The DNC further argues that "not all party expenditures that are coordinated with candidates implicate the statutory purposes [of 2 U.S.C. § 441a(d)]." The DNC claims that it may need to communicate with candidates because they are also "party officials, leaders and spokespersons" and that party positions and communications may need to be coordinated with one or more candidates. Moreover, the DNC claims that 2 U.S.C. § 441a(d), if construed broadly, may be unconstitutionally vague because the DNC will be "required to guess at what point along the broad spectrum the limits of section 441a(d) will apply."

On November 20, 1996, the DNC submitted its response to MUR 4544. The DNC contends that the complaint does not directly name the DNC nor does it recite any facts that allege any violation of the Act. The DNC argues that the complaint "merely alludes to statements made by Ann McBride of Common Cause" and that it is impossible for it to file any meaningful response to the complaint because it has not been provided a copy of the C-Span videotape.[5] As a result, the DNC asserts that it has "clearly been prejudiced." Finally, the DNC argues that the Commission may have failed to comply with 11 C.F.R. § 111.5(b) "since the receipt date on the complaint is illegible," and further argues that the service of the complaint is in violation of 11 C.F.R. § 111.5(a) since the complaint fails to

[5] On December 9, 1996, the Commission forwarded a copy of the C-Span videotape to the DNC. The DNC has not amended its original response.

meet the technical requirements of 11 C.F.R. § 111.4. Accordingly, the DNC requests that the complaint be dismissed.

C. VALIDITY OF COMPLAINTS

Any person who believes that a violation of the federal election campaign laws[6] has occurred may file a complaint with the Commission. 2 U.S.C. § 437g(a)(1). A complaint shall provide the full name and address of the complainant, and the contents of the complaint shall be sworn to and signed in the presence of a notary public and notarized. 11 C.F.R. § 111.4(b). The complaint should clearly identify as a respondent each person or entity who is alleged to have committed a violation; identify the source of information which gives rise to the complainant's belief in the truth of statements which are not based on the complainant's personal knowledge; contain a clear and concise recitation of the facts which describe a violation; and be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant. 11 C.F.R. § 111.4(d).

The Commission concludes that the complaints in MURs 4407 and 4544 are legally sufficient. The complaints each contain the full name and address of the complainants and were signed and sworn in the presence of a notaries public.

The complaints also comply with the recommended factors stated at 11 C.F.R. § 111.4(d). For instance, the complaint in MUR 4407 clearly identifies the DNC as a respondent who is alleged to have committed violations of the Act and the Presidential Primary Matching Payment Act, as amended, 26 U.S.C. §§ 9031 et seq. ("Matching Payment Act").

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[6] These laws consist of the Act, the Presidential Election Campaign Fund Act, as amended, 26 U.S.C. §§ 9001 et seq. and the Presidential Primary Matching Payment Account Act, as amended, 26 U.S.C. §§ 9031 et seq.

See 11 C.F.R. § 111.4(d)(1). Although the complainant did not have personal knowledge of the violations, the complainant refers to *The Choice* and the Primary Committee disclosure reports as the source of the information which gives rise to its belief in the truth of its assertions. *See* 11 C.F.R. § 111.4(d)(2).[7] The complaint also contains a clear and concise recitation of factual allegations which, as discussed below, describe violations of a statute or regulation over which the Commission has jurisdiction. *See* 11 C.F.R. § 111.4(d)(3).[8]

The complaint in MUR 4544 also meets the requirements of 11 C.F.R. § 111.4(d). It identifies the DNC as an entity who is alleged to have committed violations of the Act and the Matching Payment Act. *See* 11 C.F.R. § 111.4(d)(1). Moreover, in references in the complaint and in forwarding the videotape to the Commission, Dr. Carley identified the source of information which gave rise to her belief in the truth of her assertions against the DNC. *See* 11 C.F.R. § 111.4(d)(2). The complaint in MUR 4544 also contains a clear and concise recitation of factual allegations which, as discussed in detail below, describes a violation of statutes and regulations over which the Commission has jurisdiction. *See* 11 C.F.R. § 111.4(d)(3).[9]

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[7] On November 15, 1979, the Commission determined to continue to accept complaints based on newspaper articles containing substantive facts. Commission Memorandum 663. Books containing substantive facts are no different from newspaper articles containing substantive facts. The attached excerpts from *The Choice* contain substantive factual allegations, such as named persons, particular acts and possible violations of federal election campaign laws. Additional information obtained from *Behind the Oval Office*, a book written by a close advisor to the President, and various newspaper articles bolsters the allegations made in the complaints.

[8] Although the complaint does not mention any particular advertisements, the complaint's reference to excerpts from *The Choice*, which are attached as an exhibit to the complaint, is sufficient to constitute a "clear and concise recitation of the facts." 11 C.F.R. § 111.4(d)(3).

[9] Videotape copies of press conferences which allege substantive facts are no different than newspaper articles or books which allege substantive facts. *See* supra note 7. Like newspaper articles that are referred to in other complaints, the videotape copy of Ms. McBride's appearance demonstrates that the alleged violations of the Act, the Matching Payment Act and the Fund Act by the DNC were based on substantive allegations.

Finally, both complaints are accompanied by documentation available to the complainants, which supports the alleged facts. *See* 11 C.F.R. § 111.4(d)(4). The complaint in MUR 4407 contains excerpts from *The Choice* describing the advertisements and meetings between the President, Vice President Gore, Primary Committee officials and DNC representatives. The complaint in MUR 4544 was supplemented with a videotape copy of Ms. McBride's C-Span appearance referred to within her complaint. Therefore, the Commission concludes that the complaints satisfy the requirements of 2 U.S.C. § 437g(a)(1) and 11 C.F.R. § 111.4(b), as well as the suggestions of 11 C.F.R. §§ 111.4(d)(1)-(4).

D. LAW

1. Contribution Limitations

The Act prohibits multicandidate political committees from making contributions to any candidate and his or her authorized political committees with respect to any election for federal office which, in the aggregate, exceed $5,000. 2 U.S.C. § 441a(a)(2)(A).

Corporations and labor unions cannot make contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. §§ 114.2(a), (b). No candidate or political committee shall knowingly accept such a prohibited contribution. A political committee that accepts contributions from corporations and/or labor unions for permissible purposes must establish separate accounts or committees for the receipt of federal and non-federal funds. 11 C.F.R. § 102.5(a). A political committee that maintains both federal and non-federal accounts shall make disbursements for federal elections from its federal account only. 11 C.F.R. § 102.5(a)(1)(i); *see also Colorado Republican Campaign Committee v. FEC*,

116 S.Ct. 2309, 2316 (1996)("Unregulated soft money contributions may not be used to influence a federal campaign.").

A contribution includes any gift, subscription, loan, advance, deposit of money or anything of value made by any person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(8)(A)(i). "Anything of value" includes all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii). An expenditure includes any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(9)(A)(i). "Anything of value" includes in-kind contributions. 11 C.F.R. § 110.8(a)(1)(iv)(A).

An expenditure made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents shall be considered a contribution to such candidate. 2 U.S.C. § 441a(7)(B)(i). In *Buckley v. Valeo*, 424 U.S. 1, 78 (1976), the Supreme Court explicitly recognized that expenditures made in coordination with candidates are "contributions" within the meaning of the Act. As the Court stated, the term "contribution" includes "not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate," and found that, "[s]o defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign." 424 U.S. at 78. The Court held that payments for communications that are independent from the candidate, his or her committee, and his or her agents are free from governmental regulation so long as the communications do not "in express terms advocate the

election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44, 46-47. The Court held that communications that are authorized or requested by the candidate, an authorized committee of the candidate, or an agent of the candidate are to be treated as expenditures of the candidate and contributions by the person or group making the expenditure. 424 U.S. at 46-47 at note 53. The Court stated that coordinated expenditures are treated as in-kind contributions subject to the contribution limitations in order to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 46-47.

Subsequent cases have reiterated these basic principles. In *FEC v. Massachusetts Citizens for Life, Inc.*, the Court stated that expenditures by corporations that are made independent of any coordination with a candidate are prohibited by 2 U.S.C. § 441b only if they "expressly advocate the election or defeat of a clearly identified candidate." 479 U.S. 238, 248-49, 256 (1986)(quoting *Buckley*, 424 U.S. at 80). More recently, in *Colorado Republican Campaign Committee v. FEC*, the Court held that political parties may make independent expenditures on behalf of their congressional candidates without limitation. 116 S.Ct. 2309 (1996). In *Colorado*, the Court reiterated the *Buckley* distinction between independent expenditures and coordinated contributions, and focused on whether the expenditures in that case were in fact coordinated. The Court noted that in previous cases, it had found constitutional "limits that apply both when an individual or political committee contributes money directly to a candidate and also when they indirectly contribute by making expenditures that they coordinate with the candidate, § 441a(a)(7)(B)(i)." 116 S.Ct. at 2313. The Court's plurality opinion expressly declined to address the issue of whether limitations on

coordinated expenditures by political parties are constitutionally permissible. The opinion notes the similarities between coordinated expenditures and contributions: "many such expenditures are also virtually indistinguishable from simple contributions (compare, for example, a donation of money with direct payment of a candidate's media bills. . .)." 116 S.Ct. at 2320.

2. Coordinated Party Expenditures

The national committee of a political party may make expenditures in connection with the general election campaign of its Presidential candidate that do not exceed an amount equal to two cents multiplied by the voting age population of the United States. 2 U.S.C. § 441a(d)(2). These "coordinated party expenditures" on behalf of a national party committee's candidate in the Presidential general election campaign are not subject to, and do not count toward, the contribution and expenditure limitations found at 2 U.S.C. §§ 441a(a) and (b).[10] 2 U.S.C. § 441a(d). A coordinated party expenditure allows party committees to engage in activity that would otherwise result in an excessive in-kind contribution to a candidate. In *Colorado*, the Supreme Court stated that section 441a(d) creates an exception from the $5,000 contribution limitation for political parties, and creates substitute limitations on party expenditures. 116 S.Ct. at 2313-2314. Conversely, a coordinated party expenditure in excess of the 2 U.S.C. § 441a(d)(2) limitations would constitute an excessive in-kind contribution from the national party to the candidate.

In determining whether specific communications paid for by parties were coordinated expenditures subject to the 2 U.S.C. § 44la(d) limitations, the Commission has considered

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[10] The coordinated party expenditure limitation for the 1996 general election was $11,994,007.

whether the communication refers to a "clearly identified candidate" and contains an "electioneering message." AO 1984-15; AO 1985-14. The term "clearly identified" means that the name of the person involved appears, a photograph or drawing of the candidate appears; or the identity of the candidate is apparent by unambiguous reference. 2 U.S.C. § 431(18). The definition of "electioneering message" includes statements designed to urge the public to elect a certain candidate or party, or which would tend to diminish public support for one candidate and garner support for another candidate. *FEC v. Colo. Republican Fed. Campaign Comm.*, 59 F.3d 1015, 1023 (10th Cir. 1995) (citing to AO 1984-15), *rev'd on other grounds*, 116 S.Ct. 2309 (1996) (The Court did not address the content of the advertisements at issue); *see* AO 1985-14 ("electioneering messages include statements 'designed to urge the public to elect a certain candidate or party'") (citing *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957)). The Commission has also stated that "expenditures pursuant to 2 U.S.C. § 441a(d) may be made without consultation or coordination with any candidate and may be made before the party's general election candidates are nominated." AO 1985-14, citing AO 1984-15.

3. Allocation

A political committee that finances political activity in connection with both federal and non-federal elections shall segregate funds used for federal elections from funds used for non-federal elections. 11 C.F.R. § 102.5(a)(1). If a political committee makes disbursements in connection with both federal and non-federal elections, it must allocate those disbursements between federal and non-federal funds. 11 C.F.R. § 106.5(a). Allocable disbursements include administrative expenses not attributable to a clearly identified candidate, and generic

activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate. 11 C.F.R. §§ 106.5(a)(2)(i) and 106.5(a)(2)(iv).

In Presidential election years, national party committees shall allocate at least 65% of their administrative and generic voter drive expenses to their federal accounts. 11 C.F.R. § 106.5(b)(2)(i). This allocation is "intended to reflect the national party committees' primary focus on presidential and other federal candidates and elections, while still recognizing that such committees also participate in party-building activities at state and local levels . . . ." Explanation and Justification for 11 C.F.R. § 106.5(b), 55 *Fed. Reg.* 26,063, 26,063 (June 26, 1990). In non-Presidential election years, national party committees shall allocate at least 60% of their administrative and generic voter drive expenses to their federal accounts. 11 C.F.R. § 106.5(b)(2)(ii).

4. Reporting

Each treasurer of a political committee shall file reports of its receipts and disbursements. 2 U.S.C. § 434(a)(1). Political committees other than authorized committees shall also disclose for the appropriate reporting period all disbursements, including contributions made to other political committees, as well as expenditures by national committees in connection with the general election campaigns of candidates for federal office. 2 U.S.C. §§ 434(b)(4)(H)(i) and (iv). Each in-kind contribution shall be reported as both a contribution and an expenditure. 11 C.F.R. §§ 104.13(a)(1) and 104.13(a)(2); 2 U.S.C. § 434(b)(4). Moreover, if a political committee is required to allocate disbursements between

federal and non-federal funds, the treasurer must report the appropriate allocation ratios. 11 C.F.R. § 104.10(b)(1).

E. ANALYSIS

These matters involve possible coordinated expenditures made by the DNC for the purpose of influencing President Clinton's election that resulted in excessive in-kind contributions to his Primary Committee and coordinated party expenditures in excess of the 2 U.S.C. § 441a(d)(2) limit, or both, as well as other related violations.

Based on the allegations in the complaints and public information, including disclosure reports, the books *The Choice* and *Behind the Oval Office*, and various press reports,[11] it appears that the DNC may have paid for a major advertising campaign in 1995 and 1996, the timing, geographic focus and content of which were calculated to further President Clinton's re-election efforts.[12] Furthermore, the available information indicates that the President and campaign officials directed and actively participated in the development of this advertising campaign.[13]

Significantly, these matters involve the possible circumvention of expenditure limitations imposed upon a publicly-financed Presidential campaign. Expenditure limitations are an integral part of the public financing system, and the Supreme Court in *Colorado*, for example, implicitly recognized that different considerations may apply in cases involving

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[11] *E.g.*, *Boston Globe* article dated February 23, 1997, *National Journal* article dated May 11, 1996, and *Washington Post* article dated October 16, 1997.

[12] The available information discusses a campaign of television advertisements; however it is possible that radio or other advertising media were also part of the advertisement campaign.

[13] It appears that during the initial formulation of the advertising campaign, the Primary Committee planned to pay for the advertisements, and that it paid for an initial advertisement concerning assault weapons. However, according to the complaint and other available information, it was subsequently decided that the DNC would pay for the advertising campaign.

candidates who accept public funding. *See* 2 U.S.C. § 441a(b); 26 U.S.C. §§ 9003(b), 9033, 9035. Similarly, in *Republican National Committee v. FEC*, the district court held that the burdens on free expression, if any, caused by conditioning eligibility for public funding on a presidential candidate agreeing to expenditure limitations do not violate the First Amendment. 487 F. Supp. 280, 284-87 (S.D.N.Y. 1980), *aff'd mem.* 445 U.S. 955 (1980); *see also Buckley*, 424 U.S. at 57, 86-108.

The allegations in these matters also raise questions concerning the relationship between a President and his or her party. As titular head of his or her party, the President will necessarily interact frequently with officials of the national party, party candidates, office holders, and supporters in working toward common legislative and policy positions and goals, as well as in the context of campaign activity. The crucial question is at what point specific party expenditures become subject to 2 U.S.C. § 441a(d). The opinion of the Commission is that the distinction between permissible interaction and coordinated activity, in cases involving speech-related activity, lies in the purpose and content of any resulting expenditure. Where, as here, there is information suggesting that campaign officials were actively involved in planning the advertisement campaign that the President acknowledged was central to sustaining public support for him, and where the content, timing and broadcast areas of the advertisements appear calculated to bolster the President's bid for re-election, then there is reason to believe that the coordinated expenditures were in-kind contributions to President Clinton's re-election campaign or coordinated party expenditures subject to 2 U.S.C. § 441a(d)(2).[14]

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[14] Although the content, timing and broadcast areas of the advertisements appear calculated to bolster the President's bid for re-election, the available advertisements do not appear to expressly advocate the election or

In *Behind the Oval Office*, Presidential consultant and author Dick Morris explains that the advertising campaign was key to the President's re-election campaign strategy:

> [T]he key to Clinton's victory was his early television advertising. . . . In 1996, the Clinton campaign, and, at the President's behest, the DNC spent upwards of eighty-five million dollars on ads. . . .
>
> Week after week, month after month, from early July 1995 more or less continually until election day in '96, sixteen months later, we bombarded the public with ads. The advertising was concentrated in the key swing states . . . . for a year and a half. This unprecedented campaign was the key to success.

And he notes that "voter share zoomed where we advertised." Mr. Morris states that the intent was to keep the advertisements on the air until election day, in order to secure the President's nomination and re-election.

The advertising campaign appears to have included advertisements shown in a number of battleground states at various times throughout 1995 and 1996. It appears that the advertisements were created by SKO and/or the November 5 Group, Inc. ("November 5").[15]

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defeat of any candidate. In its response in MUR 4407, the DNC urges dismissal of the complaint, arguing that absent such express advocacy the expenditures for the advertisements are not subject to 2 U.S.C. § 441a(d).

While the Supreme Court has limited regulation of independent expenditures to communications containing express advocacy because of constitutional concerns, it has not imposed any similar restriction on the regulation of coordinated expenditures or other contributions. Express advocacy is not required for the regulation of expenditures which are coordinated with candidates and their campaigns, and such expenditures are in-kind contributions or coordinated party expenditures subject to 2 U.S.C. § 441a(d)(2). Because there is reason to believe that the expenditures in these matters were made in cooperation with, and at the direction of, the candidate and campaign staff, recent cases involving independent expenditures and express advocacy are inapposite. *See, e.g., Federal Election Commission v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997).

[15] It appears that SKO and November 5 may be interconnected. November 5 is a District of Columbia corporation that was established on February 5, 1996. Its Board of Directors consists of Anthony Parker, William Knapp, and Robert Squier, and, during the period of time leading up to the general election, its principal place of business was 511 Second Street, N.W., Washington, D.C. 20002. This address is the same as SKO's address.

The available advertisement copies for 1996 indicate that the advertisements were run on television; however, no similar markings exist on the 1995 advertisement copies.

The advertisements provided by the DNC have a similar tone and style to each other. In general, they discuss President Clinton's position on diverse subjects such as Medicare, the budget, education, health care, children, taxes and immigration and contrast his views with those of the Republicans in Congress, particularly Senator Dole, who eventually became the Republican Presidential nominee, and House Speaker Gingrich.[16]

For example, an advertisement titled "Moral" dated August 1995 states, in part: "The Republicans are wrong to want to cut Medicare benefits. And President Clinton is right to protect Medicare . . . [sic] right to defend our decision, as a nation, to do what's moral, good and right by our elderly." Another advertisement, titled "Protect" from August 1995 states: "There is a way to protect Medicare benefits and balance the budget. President Clinton. . . . The Republicans disagree. They want to cut Medicare $270 billion. . . ."

While some of the advertisements contrasted the President's views with Republican positions, others were essentially negative attacks on Senator Dole and Speaker Gingrich. One advertisement called "Wither" from November 1995 stated:

> Finally we learn the truth about how the Republicans want to eliminate Medicare. First . . . [sic] Bob Dole. 'I was there, fighting the fight, voting against Medicare, one of 12 -- because we knew it wouldn't work -- in 1965.' Now . . . [sic] Newt Gingrich on Medicare. 'Now we don't get rid of it in round one because we don't think that that's the right way to go through a transition, but we believe it's going to wither on the vine.' The Republicans in Congress. They never believed in Medicare. And now, they want it to wither on the vine.

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[16] The Commission's knowledge of the content of the advertisements is based on its review of advertisement scripts, where such scripts are available, as well as various other accounts which have been brought to the Commission's attention. The advertisement scripts are attached to this Factual and Legal Analysis. There may be other advertisements of which the Commission does not have knowledge at this time.

Twelve of the available advertisements characterize Republicans as opponents to President Clinton's policies; six advertisements specifically imply that Senator Dole and Speaker Gingrich are obstacles to passage of President Clinton's policies in Congress. Some of the advertisements focused on the budget battle between the President and Congress, contrasting the President's budget plan with Republican plans to cut education, environmental protection and health care. A number of advertisements link the names of Senator Dole and Speaker Gingrich. For example, an advertisement titled "Table" from January 1996 states:

> The Gingrich Dole budget plan. Doctors charging more than Medicare allows. Head Start, school anti-drug help slashed. Children denied adequate medical care. Toxic polluters let off the hook. But President Clinton has put a balanced budget plan on the table protecting Medicare, Medicaid, education, environment. The President cuts taxes and protects our values. But Dole and Gingrich just walked away. That's wrong. They must agree to balance the budget without hurting America's families.

Similarly, other advertisements refer to the "Dole Gingrich attack ad" and the "Dole/Gingrich Budget." It appears that the advertisements continued until mid-1996.

There is reason to believe that the DNC-funded advertising campaign was the result of cooperation between the DNC and the President and his campaign organizations. According to *The Choice*, the DNC "functioned as the unofficial arm of the Clinton campaign" and President Clinton directed the committee's efforts." *The Choice* describes several White House meetings between President Clinton, Vice President Gore, Primary Committee officials and DNC officials where the advertisements were discussed. For example, Mr. Woodward writes:

> [Dick] Morris wanted more money from [the Primary Committee] to run television advertisements emphasizing the President's policy of protecting Medicare, not cutting it. The crime ads which had run earlier in the summer had been a giant smash hit, Morris was still arguing.

> Clinton liked the idea and wondered aloud why they were not up on the air talking about his agenda.
>
> Terry McAuliffe argued strenuously against spending more money on ads. 'They'll be using our precision money,' he said. . . .
>
> Harold Ickes said he agreed 100 percent with McAuliffe. The Clinton-Gore money was their insurance policy during the primary season. Even though it looked like there was no challenger to Clinton, one could emerge in a flash.[17]

It appears that Clinton's re-election strategists decided to take advantage of Clinton's role as titular head of the Democratic Party to use the DNC's money to further his re-election. For example, Mr. Woodward also alleges that as a result of further discussions about the President's re-election efforts:

> Clinton wanted an ad campaign. Morris was pressing, Ickes and McAuliffe were resisting.
>
> There was only one other place to get the money: the Democratic National Committee, which functioned as the unofficial arm of the Clinton campaign. And Clinton, as the head of the party, directed the committee's efforts. The [DNC] could launch a new fund-raising effort as it had in 1994 when millions had been raised in a special effort to televise Pro-Clinton health care reform ads. Though opponents of his health care reform plan had spent much, much more, the idea was sound. Clinton said he was not going to be drowned out this time, and directed a special fund-raising effort.

Mr. Woodward further writes:

> In all, some $10 million was raised in the special fund-raising effort . . . to finance what eventually became a $15 million advertising blitz.
>
> For several months, Morris and Bob Squier had been testing a half a dozen possible 30-second scripts and television ads a week for possible use. At weekly evening meetings in the White House, Clinton went through them, offered suggestions and even edited some of the scripts. He directed the

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[17] At the time these meetings allegedly occurred, Harold Ickes was the President's Deputy White House Chief of Staff and Terry McAuliffe was the DNC Finance Chairman.

> process, trying out what he wanted to say, what might work, how he felt about it, and what it meant. . . .

Finally, Mr. Woodward asserts that "Clinton remained heavily involved in the day-to-day presentation of his campaign through television advertising. . . . Clinton personally had been controlling tens of millions of dollars worth of DNC advertising."

In *Behind the Oval Office*, Mr. Morris similarly suggests that the advertising campaign was developed with the active participation and interaction of the candidate, campaign staff, DNC representatives, White House staff, and the media consultants.[18] Mr. Morris states that he reviewed the questionnaires for the polls, the polling results, the scripts and test runs of the advertisements with President Clinton. He alleges:

> the [P]resident became the day-to-day operational director of our TV-ad campaign. He worked over every script, watched every ad, ordered changes in every visual presentation, and decided which ads would run where. He was as involved as any of his media consultants were. The ads became not the slick creations of ad-men but the work of the [P]resident himself. . . .

Indeed, he states that "the entire fate of Clinton's presidency hinged on this key decision" to run advertisements, and "the decision to advertise early and continually" was one of the "keys to victory in '96" and "took us into 1996 with a lead over Dole."

It also appears that President Clinton acknowledged to DNC donors that the purpose of the DNC-funded advertisement campaign was to bolster the President's election bid. A

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[18] In *Behind the Oval Office*, Mr. Morris states that in addition to the President, Vice President and himself, a number of other individuals were involved in White House meetings to discuss the development or creation of the advertisements. These included White House staff, DNC representatives and campaign officials such as Leon Panetta, Harold Ickes, Terry McAuliffe, George Stephanopoulos, Doug Sosnik, Erskine Bowles, Senator Chris Dodd, Peter Knight, and Ann Lewis. In addition, a number of consultants attended these strategy meetings including Robert Squier, Bill Knapp, Marius Penczner, Hank Sheinkopf, Mark Penn and Doug Schoen. Mr. Squier and Mr. Knapp are partners in SKO; Mr. Penczner is a media consultant; Mr. Sheinkopf is a media consultant with the firm of Austin-Sheinkopf; and Mr. Penn and Mr. Schoen are pollsters.

videotape released by the White House shows the President addressing DNC donors invited to a May 21, 1996 White House lunch, and stating:

> Many of you have given very generously and thank you for that [. . .] The fact that we've been able to finance this long-running constant television campaign . . . where we're always able to frame the issues . . . has been central to the position I now enjoy in the polls, [. . . The ads helped] sustain an unbroken lead for five and a half months.

Based on the foregoing information, at this time it appears that these matters do not involve independent expenditures. An "independent expenditure" is an expenditure that expressly advocates the election or defeat of a clearly identified candidate which is made *without* cooperation or consultation with any candidate or any authorized committee or agent of a candidate, and which is *not* made in concert with, or at the suggestion of, any candidate or any authorized committee or agent of a candidate. 2 U.S.C. § 431(17); 11 C.F.R. § 109.1. Conversely, any expenditure that *is* made with cooperation or consultation , in concert with, or at the suggestion of any candidate, agent of a candidate, or authorized committee *cannot* be an independent expenditure. Rather, such a coordinated expenditure is an in-kind contribution to the candidate. 2 U.S.C. § 441a(a)(7)(B)(i).

Likewise, the information presently available to the Commission suggests that these matters do not involve legislative advocacy advertisements like the advertisements at issue in AO 1995-25. In AO 1995-25, the Commission concluded that costs related to advertisements focusing on national legislative advocacy activity and the promotion of the Republican Party were allocable between the Republican Party's federal and nonfederal accounts pursuant to 11 C.F.R. §§ 106.5(b)(2)(i) and (ii). However, unlike the situation in AO 1995-25, here the timing of the media campaign, the apparent coordination between campaign officials and the

DNC, and the content of the advertisements together give reason to believe that the purpose of the advertising campaign was to influence the election of President Clinton.

Finally, these matters do not appear to involve generic political advertisements, such as the radio and television advertisements that the Commission in AO 1985-14 concluded would be reportable as operating expenditures. AO 1985-14 involved, and was limited to, "situations where expenditures for . . . communications are made without any consultation or cooperation, or any request or suggestion of . . ." the candidates.[19] Furthermore, the advertisements which the Commission in AO 1985-14 concluded were not subject to limitation under 2 U.S.C. § 441a(d) did not both depict a "clearly identified candidate" and contain an "electioneering message."[20]

In contrast, these matters involve expenditures for advertisements which appear to have been made with the cooperation of, or in consultation with, the candidate or his campaign staff, and which therefore appear to have been contributions regardless whether the

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[19] In AO 1985-14, the Commission limited its analysis to the question whether the proposed expenditures were reportable as expenditures subject to limitation under 2 U.S.C. § 441a(d) or as operating expenses, having first concluded that the AO request was limited to expenditures for communications that would be made without the cooperation of, or in consultation with, any candidate. The Commission's analysis thus recognized that the Section 441a(d) limit may apply even to expenditures which are made without such cooperation or consultation. *See* AO 1984-15. *But cf. Colorado Republican Campaign Committee v. FEC*, 116 S.Ct. 2309 (1996)(party committee may make independent expenditures in Congressional elections).

[20] AO 1985-14 involved scripts for broadcast advertisements which purported to describe Republican policies. One such advertisement concluded by encouraging the voter to "[l]et your Republican Congressman know that you don't think this is funny . . . ," or in another version of the same advertisement, "[l]et the Republicans in Congress know what you think about their sense of humor." Another advertisement urged voters to let "your Republican Congressman," or the Republicans in Congress, "know that their irresponsible management of the nation's economy must end -- before it's too late." Alternative scripts added the closing statement "Vote Democratic" to these advertisements. The Commission concluded that advertisements which referred to "the Republicans in Congress" were not subject to limitation under 2 U.S.C. § 441a(d), regardless whether the advertisement closed with the statement "Vote Democratic." The Commission also concluded that advertisements which referred to "your Republican Congressman" were not subject to limitation under 2 U.S.C. § 441a(d), if the advertisement did not close with the statement "Vote Democratic." However, the Commission on a tie vote was unable to decide whether advertisements which referred to "your Republican Congressman" and which closed with the statement "Vote Democratic" were subject to limitation under 2 U.S.C. § 441a(d).

advertisements contained an electioneering message or included reference to a clearly identified candidate. *See Buckley v. Valeo*, 424 U.S. 1, 78 (1976)(the term "contribution" includes "*all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate")(emphasis added). Furthermore, these MURs involve advertisements which, according to the available information, explicitly identify President Clinton or Senator Dole, and which address the policies of the major party candidates in a manner which appears calculated to encourage the viewer to vote for one candidate over the other. Thus, there is reason to believe that the advertisements at issue meet both the "clearly identified candidate" and "electioneering message" tests.[21]

It appears that the total amount spent on the advertising campaign was between $15,000,000 and $50,000,000.[22] The DNC directly paid $2,703,034.67 to SKO and/or November 5 between January 1, 1995 and August 28, 1996, the date that President Clinton received the Democratic Party nomination for President of the United States. *See* 11 C.F.R. § 9033.5(c). The DNC reported the purpose of these expenditures as "media," and it therefore appears this amount was paid for the advertising campaign.

The advertisements provided with the DNC's response to the complaint aired between August 16, 1995 and July 16, 1996. The DNC disclosure reports for these periods (January 22, 1996; April 15, 1996; July 15, 1996; and October 15, 1996) indicate that the

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[21] *Indeed, because the advertisements in these matters do identify major party candidates for President,* these advertisements are more akin to the proposed mailers, also at issue in AO 1985-14, which identified specific congressmen by name. Based on its understandings that the proposed mailers would be distributed in all or part of the district represented by the congressman identified in that mailer, the Commission concluded that the costs of production and distribution would be subject to limitations under the Act.

[22] Throughout this Analysis, the Commission has used the $25,000,000 figure from the complaint in MUR 4407.

DNC allocated 60% of its disbursements to SKO and/or November 5 between July 1, 1995 through December 31, 1995 to its federal accounts, and 65% of its disbursements to SKO and November 5 to its federal accounts for the periods between January 1, 1996 and September 30, 1996.[23]

In addition to the amounts disbursed by the DNC directly to SKO and November 5, it appears that the DNC indirectly funneled millions of additional dollars to SKO and November 5 through the accounts of various state Democratic Party committees ("state committees") as intermediaries. Based on the similarity of the timing and amounts of the transfers, the reported purpose of the disbursements, and the statements of state committee officials, it appears that the funds paid to SKO and November 5 through state committee accounts were DNC funds, not state committee funds, and that the DNC used the state committee accounts to take advantage of state allocation ratios, which allow a greater percentage of funds for administrative expenses to be paid from non-federal accounts. *See* 11 C.F.R. § 106.5(d).

Specifically, it appears that upon receipt of these DNC funds, state committees quickly disbursed the transferred amounts, often on the day of receipt, to SKO and/or November 5 for the purchase of the advertisements. Furthermore, available information suggests that state committee officials may have been aware that state committee disbursements to SKO and November 5 were made with DNC funds at the DNC's behest. For example, it is reported that Jo Miglino, the Florida Democratic Party Communications Director, when asked by James A. Barnes, a reporter from *The National Journal*, about advertisements aired in Florida,

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[23] The DNC allocated the cost of these advertisements, apparently based on its contention that the advertisements were legislative advocacy advertisements and thus allocable as either administrative expenses or generic voter drive costs. *See* AO 1995-25; 11 C.F.R. § 106.5.

stated, "Those [advertisements] aren't ours; those are the DNC's." Attachment 12 at 4. Barbara Guttman, the Illinois Democratic Party Press Secretary, reportedly gave a similar response when Mr. Barnes asked about advertisements aired in Illinois; stating, "The DNC and Squier kind of review the numbers and the points. . . . The DNC pays for it." *Id.* Finally, Tony Wyche, the Missouri Democratic Party Communications Director, when asked by Mr. Barnes about the authority his state committee had over the ads, is reported to have responded "We have to agree to do it. . . . [But][i]t's just a technicality."

The Commission has identified DNC transfers to state committees totaling approximately $54,000,000 from various federal and non-federal accounts between January 1, 1995 through August 28, 1996. At this time, the Commission has not determined how much of the total amount was related to the advertisement campaign.

Based on the information available at this time and the allegations of the complaints, it is not clear whether the expenditures for the advertisement campaign should be treated as excessive in-kind contributions from the DNC to the Primary Committee, coordinated party expenditures that exceeded the DNC's 2 U.S.C. § 441a(d)(2) limitation, and thus, were in-kind contributions to the GEC, or some combination of both.

As a multicandidate committee, the DNC was permitted to contribute only $5,000 to the Primary Committee and President Clinton. Therefore, the Commission found reason to believe that the Democratic National Committee and Carol Pensky, as treasurer, made excessive in-kind contributions to the Clinton/Gore '96 Primary Committee, Inc. and President William J. Clinton in violation of 2 U.S.C. § 441a(a)(2)(A).[24]

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[24] On September 15, 1995, the DNC made an in-kind contribution to the Primary Committee in the amount of $1,861.21.

While the available information suggests that the advertisements may have been focused on the primary election, there is reason to believe that some portion, or all, of the expenditures made for the advertisement campaign were coordinated party expenditures related to the general election that exceeded the 2 U.S.C. § 441a(d)(2) limitation.[25]

The coordinated party expenditure limitation for the 1996 Presidential general election was $11,994,007. Although the DNC reported coordinated party expenses, as of July 31, 1997, on behalf of the GEC totaling $8,314,020.75, none of the advertisements at issue here appears to be included in this amount. When the apparent cost of the advertisement campaign is added to the amount of the reported coordinated party expenses, the amount exceeds the 2 U.S.C. § 441a(d)(2) expenditure limitations. Therefore, the Commission has found reason to believe that the Democratic National Committee and Carol Pensky, as treasurer, exceeded the 2 U.S.C. § 441a(d) coordinated expenditure limitations in violation of 2 U.S.C. §§ 441a(f).

There is reason to believe that the DNC made in-kind contributions to the Primary Committee, or made coordinated party expenditures in excess of the 2 U.S.C. § 441a(d)(2) limitations that constituted in-kind contributions to the Primary Committee, the GEC, or both,

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[25] Most, if not all, of the advertisements apparently were created and broadcast prior to President Clinton's nomination. Although coordinated party expenditures may be made before the party's general election candidates are nominated, the timing of the advertisements is relevant to determining how they should be allocated between the primary and general election campaigns, and what sorts of funds may be used to pay for them, *see* AO 1984-15, AO 1985-14. Developments in public financing cases and the Commission's regulations since the issuance of AO 1984-15 have emphasized the importance of the timing of expenditures. For example, the Commission acknowledged the significance of both timing and purpose in its recently revised regulations at 11 C.F.R. § 9034.4(e), which set forth rules for attributing expenditures between the primary and general election limitations for candidates who receive both primary and general public funds. Under these regulations, expenditures for communications are allocated based on the date of broadcast; media production costs for media used both before and after the date of nomination are attributed 50% to the primary campaign and 50% to the general campaign. 11 C.F.R. §§ 9034(e)(5) and (6)(ii).

by paying for an advertisement campaign in 1995 and 1996 to benefit President Clinton's re-election campaign. The DNC did not report the disbursements for the advertisements as contributions to the Primary Committee or the GEC. Nor did it report the expenditures as coordinated party expenditures. Since the expenditures were not allocable, there is reason to believe that the DNC improperly reported the disbursements when it allocated its direct disbursements to SKO and November 5. Further, there is reason to believe that the DNC improperly reported the transfers to the state committees, which may have been payments to SKO and November 5 that were funneled through the state committees to disguise their origin. Therefore, the Commission has found reason to believe that the Democratic National Committee and its treasurer, Carol Pensky, violated 2 U.S.C. § 434(b)(4).

It also appears that the DNC used funds from its non-federal accounts to pay for these advertisements. These accounts likely contained corporate and labor organization contributions, which are prohibited with respect to federal activities. Therefore, the Commission has found reason to believe that the DNC and its treasurer, Carol Pensky, violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 102.5(a).

Attachment: DNC advertisement scripts